MARION STEVENS

IBLA 75-319 Decided May 10, 1982

Appeal from decision of the Fairbanks, Alaska, District Office, Bureau of Land Management, rejecting Alaska Native allotment application F-13356.

Petition for reconsideration granted; prior Board decision, Marion Stevens, 23 IBLA 280 (1976), and decision appealed from vacated; case remanded.

1. Alaska: Native Allotments -- Powersite Lands -- Withdrawals and Reservations: Powersites

   A Native allotment application describing land within a powersite withdrawal may be approved pursuant to sec. 905 of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435-37 (1980), subject to protests filed within 180 days of enactment of the statute, where the land is not part of a project licensed under the Federal Power Act of June 10, 1920, as amended, or presently used for purposes of generating or transmitting electrical power or for any other project authorized by act of Congress. Where the allotment applicant's use of the land commenced after the withdrawal, the allotment shall be subject to the right or reentry provided the United States by sec. 24 of the Federal Power Act, as amended.

APPEARANCES: Frederick Torrisi, Esq., Anchorage, Alaska, for appellant; James N. Reeves, Esq., Assistant Attorney General, for the State of Alaska.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Marion Stevens has petitioned for reconsideration of the Board's decision styled Marion Stevens, 23 IBLA 280 (1976), in which we affirmed a decision of the Fairbanks District Office, Bureau of Land Management (BLM), rejecting her Native allotment application F-13356. We held that appellant

had failed to demonstrate substantially continuous use and occupancy for a 5-year period prior to withdrawal of the land for powersite purposes. Appellant has petitioned for reconsideration, requesting a hearing in light of the decision in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

In her Native allotment application, appellant states that her use and occupancy of the allotment began on June 15, 1964. In responding to a BLM request to provide additional evidence, appellant submitted a statement asserting that her use and occupancy began in the fall of 1963, a date subsequent to the filing with BLM of an application for withdrawal of the land for the Rampart Canyon Power Project on January 9, 1963. The land was subsequently classified as a powersite by Public Land Order No. 3520 of January 5, 5, 1965. 30 FR 271 (Jan. 9, 1965).

This case must be remanded for readjudication in light of a recently enacted statutory provision that affects Native allotment applications for lands within powersite withdrawals. Section 905 of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435-37 (1980), provides in pertinent part as follows:

> (a)(1) Subject to valid existing rights, all Alaska Native allotment applications made pursuant to the Act of May 17, 1906 (34 Stat. 197, as amended) which were pending before the Department of the Interior on or before December 18, 1971, and which describe either land that was unreserved on December 13, 1968, or land within the National Petroleum Reserve -- Alaska (then identified as Naval Petroleum Reserve No. 4) are hereby approved on the one hundred and eightieth day following the effective date of this Act, except where provided otherwise by paragraphs (3), (4), (5), or (6) of this subsection, or where the land description of the allotment must be adjusted pursuant to subsection (b) of this section, in which cases approval pursuant to the terms of this subsection shall be effective at the time the adjustment becomes final. The Secretary shall cause allotments approved pursuant to this section to be surveyed and shall issue trust certificates therefor.
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> (d) Where the land described in an allotment application pending before the Department of the Interior on or before December 18, 1971 (or such an application as adjusted or amended pursuant to subsection (b) or (c) of this section), was on that date withdrawn, reserved, or classified for powersite or power-project purposes, notwithstanding such withdrawal, reservation, or classification the described land shall be deemed vacant, unappropriated, and unreserved within the meaning of the Act of May 17, 1906, as amended, and as such, shall be subject to adjudication or approval pursuant to the terms of this section: Provided, however, That if the described land is included as part of a project licensed under part I of the Federal Power Act of June 10, 1920 (41 Stat. 24), as amended, or is presently utilized for purposes of generating or transmitting electrical power or

> for any other project authorized by Act of Congress, the foregoing provision shall not apply and the allotment application shall be adjudicated pursuant to the Act of May 17, 1906, as amended: Provided further, That where the allotment applicant commenced use of the land after its withdrawal or classification for powersite purposes, the allotment shall be made subject to the right of reentry provided the United States by section 24 of the Federal Power Act, as amended: Provided further, That any rights of reentry reserved in a certificate of allotment pursuant to this section shall expire twenty years after the effective date of this Act if at that time the allotted land is not subject to a license or an application for a license under part I of the Federal Power Act, as amended, or actually utilized or being developed for a purpose authorized by the Act, as amended, or other Act of Congress.

[1] The record does not disclose whether the land in the allotment is within a licensed project or if the land described in the application is presently utilized for the purposes of generating or transmitting electrical power or any other project authorized by Congress. If this is not the case, the land may be considered to be unreserved and the allotment may be granted pursuant to section 905(a)(1), subject to any protests filed within 180 days of passage of the Act on December 2, 1980, as provided by section 905(a)(5). Wayne C. Williams (On Reconsideration), 61 IBLA 181 (1982). In the absence of any indication in the record that appellant's use and occupancy preceded withdrawal of the land for powersite purposes, the allotment shall be made subject to the right of reentry provided the United States by section 24 of the Federal Power Act. See William Carlo, Sr. (On Reconsideration), 53 IBLA 168 (1981).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, appellant's petition for reconsideration is granted; our prior decision and the decision appealed from are vacated, and the case is remanded for further action consistent with this opinion.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge